

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY MENEFEE,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 99-751
v.	:	
	:	
GENERAL FOAM PLASTICS	:	
CORPORATION and K-MART	:	
CORPORATIONS,	:	
	:	
Defendants.	:	

MEMORANDUM

Buckwalter, J.

March 19, 1999

Presently before this Court is a motion to remand this civil action to state court.

On January 31, 1997, Plaintiff instituted an action in the Court of Common Pleas of Philadelphia County, naming General Foam Plastics Corporation (“General Foam”), K-Mart Corporation (“K-Mart”) and Wood Brothers Building Supply Company (“Wood Brothers”) as Defendants. See Menefee v. General Foam Plastics Corp., et al., No. 3436 (Phila. C.C.P. Jan. Term 1997). The suit alleged several claims of products liability against Defendants based upon injuries sustained as a result of using a ladder attached to an above-ground swimming pool. Plaintiff alleges that the pool and its component parts were designed, manufactured, and sold by Defendants.

On January 31, 1998, the Court of Common Pleas granted Defendant Wood Brothers’ motion for summary judgment. As Wood Brothers was the only defendant that

destroyed complete diversity of citizenship, Defendants General Foam and K-Mart removed the action to federal court on February 12, 1999. In the notice of removal, Defendants claimed that joinder of Wood Brothers as a defendant in the action was fraudulent. In response, Plaintiff filed the instant motion to remand, arguing that Defendants have failed to establish diversity jurisdiction as the joinder of Wood Brothers was proper. Relying on the limitations found in 28 U.S.C. § 1446(b), Plaintiff further argues that, because (1) Defendants failed to file their notice of removal within thirty days of determining that the case was removable, and (2) more than one year has elapsed since the commencement of the action, the Court must remand the action to state court.

Removal of cases from state court is governed by 28 U.S.C. §§ 1441-1452. These removal statutes “are to be strictly construed against removal and all doubts should be resolved in favor of remand.” See Lamb v. Lederle Laboratories, No. CIV.A. 94-4879, 1994 WL 551536, at * 1 (Oct. 7, 1994) (citing Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990)). Additionally, joinder is considered fraudulent “where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.” Id., 1994 WL 551536. A defendant arguing against remand of an action based on diversity of citizenship that was created by ignoring a fraudulently joined defendant “bears a heavy burden of persuasion” to demonstrate that the resident defendant was fraudulently joined. Id.

To prove that defendant Wood Brothers was fraudulently joined, Defendants point to Plaintiff’s failure to comply with discovery obligations, indicating that he never had any real intention of seeking to recover from Wood Brothers. Through Plaintiff’s response to Wood Brothers’ discovery requests, Defendants were able to determine the validity of his theories of

liability against Wood Brothers. Specifically, on September 9, 1997, Plaintiff, in response to an interrogatory, disclosed that sand had been purchased from Wood Brothers. On June 17, 1998, the owner of the swimming pool, Valerie Martin, confirmed that she had purchased sand from Wood Brothers for the purpose of securing the perimeter of the pool. Ms. Martin explained that “[T]he instruction manual asks that you -- to secure the perimeter of the pool, you have to line sand around the pool to keep the pool tight and sturdy.” Martin Dep. at 24, lines 11-14 (attached as Exhibit D to Pl.’s Mem.). On October 5, 1998, Plaintiff produced expert reports on the design of the pool and its ladder, as well as Plaintiff’s injuries. Excluded from these reports was any opinion regarding Wood Brothers’ liability. As a result of Plaintiff’s failure to provide any factual basis to support Plaintiff’s theories of liability, Wood Brothers filed a motion for summary judgment. On January 26, 1999, the court granted Wood Brothers’ motion. It was at this point, Defendants argue, that it was proper to file their notice of removal as they were able to ascertain that Wood Brothers had been fraudulently joined.

The Court agrees that defendant Wood Brothers was fraudulently joined as a non-diverse defendant for the purpose of defeating complete diversity. However, the Court concludes that Defendants are barred from removing this case for failing to file their notice of removal in a timely fashion. Section 1446(b) of Title 28 of the United States Code provides:

[A] notice of removal may be filed within thirty [30] days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [diversity of citizenship] more than 1 year after the commencement of the action.

The time limits set forth in this section, however, are ignored when removal is sought on the ground of fraudulent joinder of a non-diverse party. See Cook v. Pep Boys, 641 F. Supp. 43, 47 n.2 (E.D. Pa. 1985). In such cases, the removal petition need only be filed within a reasonable time after defendant learns of the fraudulent joinder. See id. (holding that the filing of the removal petition within a thirty-day time frame was reasonable). Therefore, while Defendants' notice of removal was filed approximately two years after commencement of the action, the notice of removal is not untimely for transgressing the one-year limitation in § 1446(b).

The notice of removal is untimely, however, for failing to file within a reasonable time after learning that Plaintiff had fraudulently joined Wood Brothers. The time limit prescribed in § 1446(b), which requires that a notice of removal be filed within 30 days of discovering that a previously non-removable case is now removable, has been considered a proper measurement of time to seek removal after learning that joinder of a non-diverse defendant was fraudulent. See e.g., Cook, 641 F. Supp. at 47 n.7. See also 14A Charles A. Wright, et al., Federal Practice and Procedure § 3732, at 331 (1998). Here, Defendants argue that they properly filed their notice of removal within thirty days of their receipt of the order granting summary judgment in favor of defendant Wood Brothers. They claim that this order affirmed their belief that Wood Brothers had been fraudulently joined to defeat diversity jurisdiction.

Notwithstanding that Defendants filed their removal petition within 30 days of that order, the petition was untimely because Defendants had known beforehand of the fraudulent joinder. Indeed, Defendants were first put on notice that Wood Brothers was improperly joined on September 9, 1997, when Plaintiff responded to an interrogatory that Wood Brothers had merely supplied sand to the owner of the pool. Furthermore, on June 17, 1998, the owner's

deposition verified the absence of Wood Brothers' liability. At worst, almost a year and a half had elapsed since first receiving actual notice of the fraudulent joinder. At best, Defendants waited approximately eight months until the dismissal of Wood Brothers from the action to file their notice of removal for fraudulent joinder of a defendant. Thus, Defendants' removal petition is untimely.

For the foregoing reasons, Plaintiff's motion is **GRANTED**. An appropriate order follows.

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CORPORATION,	:	
	:	
Defendants.	:	

ORDER

AND NOW this 19th day of March, 1999, upon consideration of Plaintiff Gary Menefee's Motion to Remand (Docket No. 2), Defendants General Foam Plastics Corp. and K-Mart Corp.'s Response (Docket Nos. 5 and 6), and Plaintiff's Reply thereto (Docket No. 7), it is hereby **ORDERED** that the motion is **GRANTED**, in accordance with the accompanying memorandum.

A certified copy of this order and accompanying memorandum shall be mailed by the Clerk of the Court to the Court of Common Pleas of Philadelphia County, Pennsylvania. Additionally, the Clerk of Court shall mark this case **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.